No. 99-1815

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

KENTUCKY RIVER COMMUNITY CARE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE AMERICAN HEALTH CARE ASSOCIATION IN SUPPORT OF RESPONDENT

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Other Authorities:

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BRIEF OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3(a) on written consent of all parties, the American Health Care Association ("AHCA") respectfully submits this brief *amicus curiae* supporting the brief of respondent Kentucky River Community Care, Inc. ("KRCC" or "the Employer").[1]

INTEREST OF *AMICUS CURIAE*

The AHCA is a federation of 48 state health organizations, together representing nearly 12,000 health care providers. AHCA members collectively care for more than one million elderly and disabled individuals. The AHCA represents and advocates for the nation's long-term care community and for individuals who require long-term care services because of social needs, disability, trauma, or illness.

In this case, the Court again addresses the failure of the National Labor Relations Board ("NLRB" or "the Board") to correctly apply the statutory standard of supervisory status set forth in Section 2(11) of the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. § 152(11), in the health care industry, despite this Court's holding in *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994). In the case at bar, the Board's finding that charge nurses are not supervisors is the predicate for its holding that KRCC violated Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), by refusing to bargain with the

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1. Pursuant to Rule 37.6, the AHCA states that no counsel for a party authored this brief in whole or in part. Further, no person or entity other than the AHCA, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

Kentucky State District Council of Carpenters (the "Union"). The Court will also determine whether the Board impermissibly shifted the burden of proving supervisory status under Section 2(11) to KRCC. These questions are of great importance to the members of the AHCA, who rely on their nurses to supervise the quality and consistency of the care provided to patients and residents. The AHCA expects the parties will fully brief issues surrounding the application of Section 2(11); this Brief will focus on the burden of proof issue. The AHCA posits, *inter alia*, that in enacting Section 2(11) Congress expressly protected the right of the employer to rely upon the loyalty of its supervisors. The AHCA supports the analysis of the Sixth Circuit, which recognizes and protects that right.

SUMMARY OF THE ARGUMENT

The NLRB found that KRCC violated Section 8(a)(5) of the Act by refusing to collectively bargain with the Union concerning a Board-certified bargaining unit comprised of the Employer's nurses. A statutory element of a Section 8(a)(5) violation is that the bargaining unit at issue be an *appropriate* unit under the Act. A unit of supervisors is *not* an appropriate unit, and an employer's refusal to bargain in such a unit is *not* a violation of Section 8(a)(5). KRCC contended its nurses are supervisors within the meaning of the Act; the Board found they are not supervisors.

The determination that KRCC's nurses are not supervisors was made by the Board through an NLRB representation case. Although representation cases are deemed "non-adversarial" by the Board, NLRB procedure placed the burden of proof regarding supervisory status upon KRCC. NLRB representation case determinations are not

subject to judicial review; thus, KRCC sought review by refusing to bargain with the Union, and subsequently litigating the Section 8(a)(5) charge which followed.

In the unfair labor practice proceeding, no hearing before an administrative law judge was held. The record of the representation proceeding on the question of supervisory status was conclusive on the issue of the appropriateness of the bargaining unit. Thus, although the Board had never borne any burden of proving the elements of a Section 8(a)(5) violation, the Employer was found guilty of violating federal law.

On review, the Sixth Circuit held, *inter alia*, that the NLRB should have had the burden of proof that KRCC's nurses were not supervisors, and thus the certified bargaining unit was appropriate.

The Sixth Circuit's requirement is well-grounded in applicable law and the decisions of this Court. Sections 8(a)(5) and 9(a) of the Act establish that a respondent acts unlawfully *only* if it refuses to bargain concerning an *appropriate* unit. This Court has long recognized that Section 10(c) of the NLRA assigns the burden of proof to the Board to prove all the elements of an unfair labor practice. This is consistent with the demands of Section 7(c) of the Administrative Procedure Act ("APA"), which places the burden of persuasion upon the Board as the proponent of a finding that the Employer violated the Act.

The Circuit Court's judgment also reflects a sound understanding of congressional intent and of NLRB procedure. The contentions of the Board and the Union that employers bear the burden to prove the status of supervisors

as an "affirmative defense" to a charge, or as a statutory "exemption," disregard the explicit policies and protections afforded employers by the Taft-Hartley Act of 1947. While the Act protects employee rights, Congress expressly *intended* that the Board *also* recognize and protect the Employer's right to the undivided loyalty of its supervisors. The Circuit Court correctly harmonizes that protection of supervisory rights with the requirement that the Board prove all elements of a violation, to conclude that it is the Board which must show the employee status of KRCC's nurses.

Moreover, implicit in the Sixth Circuit's rationale is recognition of the inadequacy of Board representation procedure as a substitute for the agency carrying the burden of proof in an unfair labor practice trial. The absence of vehicles for resolving credibility conflicts, the remoteness of the finder of fact from the hearing, and the Board's oft-cited policy bias against the supervisory status of nurses create due process concerns which would undermine any findings of violation of the law.

ARGUMENT

THE NLRB COULD NOT FIND A VIOLATION OF § 8(a)(5) WITHOUT PROVING THAT KRCC'S NURSES ARE "EMPLOYEES" UNDER THE ACT

The Board seeks enforcement of its order directing KRCC to bargain with the Union. The Board found KRCC violated Section 8(a)(5) of the Act by refusing to bargain with the Union. KRCC denies any violation because the bargaining unit is comprised of supervisory employees. The U.S. Court of Appeals for the Sixth Circuit correctly denied enforcement because the NLRB failed to prove the nurses at

issue were "employees," not "supervisors," within the meaning of the Act. The NLRB asks this Court to reverse the Sixth Circuit decision, including its holding that the Board bears the burden of proof on all elements of the alleged unfair labor practice, including the nurses' status as non-supervisors. Because the Circuit Court's holding is supported by statute, case law, and sound administrative and procedural policy, this Court should uphold the decision of the Sixth Circuit.

Simply put, the Sixth Circuit has long held that "[t]he Board always has the burden of coming forward with evidence showing that the employees are not supervisors in bargaining unit determinations." *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1080 (6th Cir. 1987). In so holding, the Sixth Circuit alone has considered — and harmonized — the intentions of Congress as expressed in the Wagner Act of 1935 and the Taft-Hartley Act of 1947 along with the demands of the Administrative Procedure Act, 5 U.S.C. § 553.

A. The NLRA and the APA Require the Board to Prove Every Element of an Alleged Unfair Labor Practice.

It is axiomatic that the agency prosecuting a party bears the burden of proving each element of the alleged offense. This Court has held "that throughout the proceedings, the [NLRB] General Counsel carries the burden of proving the elements of an unfair labor practice." *N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983); *see also*, 29 U.S.C. § 160(c). Section 10(c) of the NLRA, 29 U.S.C. § 160(c), provides that the Board's findings must be by "the preponderance of the testimony." This Court has interpreted Section 10(c) and Board regulations as assigning

the burden of persuasion on the Board to establish violations of the NLRA. *Transportation Management*, 462 U.S. at 401, *citing* 29 U.S.C. § 160(c) and 29 C.F.R. § 101.10(b).

Section 7(c) of the Administrative Procedure Act provides that the "proponent of a rule or order has the burden of proof. . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record . . . and supported by the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *Steadman v. SEC*, 450 U.S. 91, 95 (1981).

In *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994) ("*Greenwich Collieries*"), this Court reviewed the legislative history of the APA:

> Every proponent of an order has the burden of coming forward with sufficient evidence therefore; any fact shown by credible evidence must be accepted as true except as the contrary has been shown or such evidence has been rebutted or impeached by duly credited evidence. . . .

Id. at 279, *citing* H.R. Rep. No. 1980, 79th Cong., 2d Sess., 36 (1946). This Court has applied the APA and Section 7(c) in its review of orders issued by the National Labor Relations Board. *See, e.g., N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393 (1983).

In the case at bar, the culpability of the employer was dependent entirely on its nurses not being deemed "supervisors." The NLRB found that KRCC unlawfully

refused to bargain with the Union in violation of Section 8(a)(5) of the Act, which provides that it is a unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of Section [9 (a)]* of this title." 29 U.S.C. § 158(a)(5) (emphasis added). Section 9(a) provides that such representatives may only be designated "in a unit appropriate for such purposes." 29 U.S.C. § 159(a). Congress thus included the appropriateness of the bargaining unit as an essential element of any Section 8(a)(5) violation. However, in this case, the Board bore no burden of proof as to the non-supervisory status of the nurses, and none on the propriety of the unit. Because the Board has not proven this essential element of the unfair labor practice, the Circuit Court correctly refused to enforce the Board's order.

B. Supervisory Status Is Not an Affirmative Defense in an Unfair Labor Practice Proceeding.

Despite this statutory language and the directives of Section 10(c) of the NLRA and Section 7(c) of the APA, the Union argues that the question of whether putative supervisors should be excluded from a bargaining unit is an "affirmative defense" to be borne by employer-respondents. Union Brief, p. 38-39. Petitioner also invokes *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), in which this Court upheld the Board's creation of an affirmative defense under plainly different circumstances. Petitioner Brief, p. 37.

The Board has traditionally shifted in the burden of proof to respondents in unfair labor practice cases alleging discriminatory action, where the respondent offers the affirmative defense that it would have engaged in the same

conduct regardless of union animus, for legitimate and lawful reasons. *See Wright Line*, 251 NLRB 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Section 8(a)(3) of the Act proscribes an employer from discriminating against employees based on their union activities or sympathies. 29 U.S.C. § 158(a)(3). The affirmative defense burden shift, which was upheld by this Court in *Transportation Management*, 462 U.S. at 401 is often referred to as a *Wright Line* defense. As this Court described it,

> [T]he unfair labor practice consists of a discharge or other adverse action . . . [where] the employee's protected conduct was a substantial or motivating factor in the adverse action. The General Counsel has the burden of proving these elements under Section 10(c). But the Board's construction of the statute permits an employer to avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation. It extends to the employer what the Board considers to be an affirmative defense but does change or add to the elements of the unfair labor practice that the General Counsel has the burden of proving under Section 10(c).

Transportation Management, 462 U.S. at 401. Still, "the General Counsel of course had the burden of proving that the employee's conduct protected by § 7 was a substantial or a motivating factor in the discharge." 462 U.S. at 400, *citing* 29 U.S.C. § 157. The gravamen of this case suggested that the Board need only *produce* evidence to trigger a shift to the respondent to prove its affirmative defense.

However, this Court clarified the proper use of a *Wright Line* affirmative defense in *Greenwich Collieries*, 512 U.S. 267 (1994). The Court stated that, as an initial matter, the drafters of the APA used the term "burden of proof" to mean burden of persuasion:

> The burden of proof is the obligation on one of the parties to persuade the trier of facts of the truth of a proposition affirmatively asserted by the pleadings. . . . The proper meaning of the burden of proof is the duty of the party alleging the case to prove it, rather than the duty of a party to introduce evidence.

Id. at 276. Although the proponent of the order always retains the ultimate burden of persuasion, a party has the burden of persuasion regarding any affirmative defense asserted. The Court overruled any element of *Transportation Management* which limited an agency's burden under Section 7(c) to merely a burden of production. *See* 462 U.S. at 403 n.7. However, this Court found the *Wright Line* shift of burdens still appropriate under closely defined circumstances:

> The NLRB's approach in *Transportation Management* is consistent with § 7(c) because the NLRB first required the employee to persuade it that antiunion sentiment contributed to the employer's decision. Only then did the NLRB place the burden of persuasion on the employer as to its affirmative defense.

Id. at 278.

Thus, the rule of *Transportation Management*, as redefined in *Greenwich Collieries*, is that the Board is permitted under Section 10(c) of the NLRA and Section 7(c) of the APA to shift the burden of proof, as an affirmative defense, in cases of alleged violations of § 8(a)(3) of the Act in which it is alleged the respondent took discriminatory action against employees based on their protected activities. This classic "*Wright Line*" analysis starkly contrasts with the instant matter, an alleged § 8(a)(5) violation, based on the putative status of the nurses as supervisors. The case at bar is *not* consistent with the limitations of the allowable shifting of burdens as defined by this Court. Moreover, the Court permitted affirmative defense burden shifting in those cases *only* because the Board was still actually required to *prove* all the elements of the unfair labor practice in question. In the case at bar, the Board stands this requirement on its head: it has imposed on the respondent the burden to *dis*prove an essential element of the unfair labor practice.[2]

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2. The Union cites *HeartShare Human Services of New York*, 317 N.L.R.B. 611 (1995), to support its position that supervisory status is an affirmative defense. In that case, the Board declined to address the employer's contention that employees included within the bargaining unit were supervisors because it did not raise that issue during representation proceedings. *Id.* at 611 n.1. In other words, even where no record at all is developed regarding supervisory status or unit appropriateness, the Board finds that its General Counsel has no obligation to establish the certified unit is proper.

C. Supervisory Status Is not an "Exemption" from the Act, but a Protected Right of Employers.

Petitioner also contends that supervisory status is an exemption from the Act which must be proven by the party asserting it. Petitioner Brief, p. 38. The Sixth Circuit rejects that myopic view of the Act, finding that the Board has routinely ignored the express provisions of the Taft-Hartley amendments of 1947 which mandate protection of employers' supervisory rights. The Board's disregard for these provisions is not new; numerous courts and commentators have ascertained an inherent policy bias in Board decisions finding nurses not to be supervisors under the Act.

1. The Sixth Circuit Harmonizes the Act's Protections of the Rights of both Employers and Employees.

Supervisors, as defined by Section 2(11) of the Act, 29 U.S.C. § 152(11), are excluded from coverage of the Act. The Board asserts that since the NLRA protects employee rights, identification of individuals as "supervisors" is an attempt to "exempt" them from the protections accorded employees under the Act. Petitioner Brief, p. 24-25. Thus, contends the Board, since KRCC seeks to exempt its nurses from coverage of the Act, principles of statutory construction require that KRCC *must* bear the burden of proof that the nurses meet the statutory definition. *Id.* Implicit in the Board's argument is the assumption that the rights of employees to engage in collective concerted activity is the *only* interest protected by the Act. However, the Board ignores the specific and express intentions of Congress articulated with passage of the Taft-Hartley amendments in 1947 — the amendments which brought the definition of

"supervisor" to the Act. The legislative history of the Taft-Hartley amendments shows that Congress viewed supervisors as far more than merely employees who are "exempt" from the Act.

To be sure, as originally drafted, the Act solely concerned employee rights. However, as experience under the Act matured, Congress recognized other competing interests needed to be protected. The Taft-Hartley amendments specifically sought to harmonize the benefits gained by employees under the Act with "carefully drawn legislation" to eliminate "specific types of injustice [and] clear inequities between employers and employees." S. Rep. No. 105, 80th Cong., 1st Sess. 1, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 407 (Comm. Print 1974).

One of the injustices the Taft-Hartley Act addressed was the fact that, under the Wagner Act, the Board was free to consider "supervisors" to be "employees" within the protection of the law:

SUPERVISORY PERSONNEL

> A recent development which probably more than any other single factor has upset any real balance of power in the collective-bargaining process has been the [invocation of] the Wagner Act for covering supervisory personnel, traditionally regarded as part of management. . . .

S. Rep. No. 105, 80th Cong., 1st Sess. 3, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 409 (Comm.

Print 1974). Likewise, Representative Hartley's House report identified "the loyalty of supervisors undermined by the compulsory unionism imposed upon them by the National Labor Relations Board" as an evil sought to be corrected by the amendment. H. Rep. No. 245, 80th Cong., 1st Sess. 5, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 296 (Comm. Print 1974). "The evidence before the committee showed this to be one of the most important and most critical problems." H. Rep. No. 245, 80th Cong., 1st Sess. 13, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 304 (Comm. Print 1974).

> . . . [U]nionizing supervisors under the Labor Act is inconsistent with the purpose of the act to increase output of goods that move in the stream of commerce, and thus to increase its flow. It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants . . .

H. Rep. No. 245, 80th Cong., 1st Sess. 14, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 305 (Comm. Print 1974).

The Senate Report considered the continuation of the Board's policy with respect to superiors to be "folly." S. Rep. No. 105, 80th Cong., 1st Sess. 4, reprinted in

Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 410 (Comm. Print 1974). The Senate Report included a recitation of the danger to industry if employers were bound to recognize and collectively bargain with units comprised of supervisors. Senator Taft's report concluded: "*It is natural to expect that unless this Congress takes action, management will be deprived of the undivided loyalty of its foremen.*" S. Rep. No. 105, 80th Cong., 1st Sess. 5, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 411 (Comm. Print 1974) (emphasis added). Similarly the House report, in a section headed "RIGHTS OF EMPLOYERS," stated:

> The evidence further shows that management must have . . . agents who are entirely loyal, just as representatives of the workers must be undivided in their loyalty to the workers.

H. Rep. No. 245, 80th Cong., 1st Sess. 8, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 299 (Comm. Print 1974) (emphasis added). The House report concluded:

> If management is to be free to manage American industry as in the past and to produce the goods o which depends our strength in war and our standard of living always, the *Congress must exclude foremen from the operation of the Labor Act*. . . .

H. Rep. No. 245, 80th Cong., 1st Sess. 15, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 306 (Comm. Print 1974) (emphasis in original).

In language which presaged contemporary circuit court decisions, the House report found in 1947 that the NLRB tended to expand its interpretation of the Act to maximize coverage of the statute. The report noted that Congress intended that the Act should always have been construed to exclude "supervisors," but that "the Labor Board, in the exercise of what it modestly calls its 'expertness,' changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust." H. Rep. No. 245, 80th Cong., 1st Sess. 17, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 308 (Comm. Print 1974) (emphasis in original).

Finally, the Senate Report explains its recommended amendment, today's § 2(11): "All that the proposal does is to prevent employers being compelled to accord supervisors the anomalous status of employees for the purpose of the Wagner Act." S. Rep. No. 105, 80th Cong., 1st Sess. 19, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 425 (Comm. Print 1974), *cited in NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1080 (6th Cir. 1987).

The Sixth Circuit has long recognized that

> The purpose of this rule [that supervisory units are voluntary] was to ensure that no one, whether employee or employer need have as his agent [i.e., supervisor] one who is obligated to those on the other side, or one whom, for any reason, he does not trust.

Newspaper Drivers & Handlers v. NLRB, 735 F.2d 969, 971 (6th Cir. 1984), *quoting* H. Rep. 245, 80th Cong., 1st Sess. 17 (1947). *See also District 2, Marine Eng'rs Beneficial Ass'n v. Amoco*, 554 F.2d 774, 778 n.5 (6th Cir. 1977). The Sixth Circuit relies upon this legislative history to establish that Congress intended the Board to protect supervisory status as well as the rights of employees.

Congress explicitly recognized that as a matter of public policy, management must be free to rely on the undivided loyalty of its supervisors. In no industry is this policy more vital to the public interest than in the health care industry. Care providers, such as the members of the AHCA, are entrusted with the health and well-being of the nation's elderly and infirm. Health care employers entrust their supervisors with more than the success of their businesses; they entrust them with the lives of our citizens. The concerns voiced by Congress in 1947 regarding the negative impact of attenuated supervisor loyalty (reduced productivity, diminished quality, etc.) could have no more compelling significance than where the "product" provided to the public is health care.

It is abundantly clear from the circumstances of Section 2(11)'s passage that the interests protected by the National Labor Relations Act are more than exclusively those of employees. The Board's reluctance to recognize the will of Congress does not diminish the fact that "supervisory status" is *not* an exemption from the Act, but an additional protected classification under the Act. The Circuit Court's requirement that the Board bear the burden to prove that KRCC's nurses are not supervisors is that court's recognition of the Act's competing interests, and is the proper accommodation the Board should provide to protect those interests.

2. The Board's Policy Bias Against Finding Supervisory Status Justifies the Sixth Circuit's Allocation of The Burden Of Persuasion.

As stated *supra*, the House report on the Taft-Hartley amendments criticized the Board's eagerness to include supervisors within the coverage of the Act. In more recent times, the Board has shown the same tendency with regard to nurses under Section 2(11). Courts have recognized that the Board, rather than accept Congress' express will, has regularly, systematically, and as a matter of policy, sought to avoid findings of supervisory status. *See, e.g., Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 492 (2d Cir. 1997), ("[T]he Board's biased mishandling of cases involving supervisors increasingly has called into question our obeisance to the Board's decisions in this area").

In *Beverly Enterprises, Virginia, Inc. v. NLRB*, 165 F.3d 290, 296 (4th Cir. 1999), the Fourth Circuit reasserted concerns, originally voiced 17 years earlier, that the Board's ever-changing analyses in Section 2(11) cases revealed a "policy bias" against finding nurses to be supervisors. *See also St. Mary's Home v. NLRB*, 690 F.2d 1062, 1067 (4th Cir. 1982) (NLRB perceived as having "institutional or policy bias" against finding supervisory status). In *Glenmark Associates, Inc. v. NLRB*, 147 F.3d 333, 340 n.8 (4th Cir. 1998), the court framed the policy pursued by the Board:

> We are not the first court to wonder whether this new interpretation is an end run around an unfavorable Supreme Court decision in order to promote policies of broadening the coverage of the Act, maximizing the number of unions certified, and increasing the number of unfair

> labor practice findings it makes rather than explicate a well-reasoned interpretation of the NLRA. . . . This troubling pattern leads us to the conclusion that the Board should reconsider its single-minded pursuit of its policy goals without regard for the supervisory role of the Third Branch.

Id., *citing Caremore, Inc. v. NLRB*, 129 F.3d 365, 371 (6th Cir. 1997)

The Sixth Circuit has been an outspoken critic of the Board's failure to consistently apply Section 2(11), particularly in cases involving health care employers. *See NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1079 (6th Cir. 1987) (criticizing the Board's reluctance to apply statutory standard). That court has recognized the Board pursues its own agenda in deciding cases involving supervisory status. Consider this further admonishment to the Board by the court in *Caremore, Inc. v. NLRB*, *supra*.

> The NLRB's position generally has been that supervisory status is almost never to be accorded nurses whose supervisory authority is exercised over less-skilled professionals in the interest of patient care. The NLRB has adhered to this line despite our repeated admonitions to the contrary . . . . *Because the NLRB continues to misapprehend both the law and its own place in the legal system,* today we state for the fifth time that individuals who possess authority in any area listed in Section 2 (11) of the NLRA (*including* the authority to effectively recommend any of the

> specifically listed actions), who exercise that authority in the interest of the employer (*including* cases in which the employer's interests is furthered by the provision of patient care), and who use independent judgment in the exercise of that authority, are supervisors within the meaning of the NLRA.

129 F.3d at 371 (emphasis added) (citations omitted).

These courts question whether the Board applies the law, or interprets it to achieve a desired result. It is, however, beyond contravention that the Board does not view supervisory status as an interest intended by Congress to be protected. The Sixth Circuit mandates that the Board recognize this intent, and gives it life by requiring the Board to bear the burden of proof in this case.

D. NLRB Representation Procedures Are Inadequate to Establish a Factual Basis Sustaining a Finding of Violation.

The NLRB has divested itself of any burden to satisfy an essential element of a Section 8(a)(5) violation — certification of an appropriate unit. As support for avoidance of this statutory burden, the Board cites no more than its own procedures. The Board asserts that it has no need to prove KRCC's nurses are not supervisors because it relies upon the record of the representation proceeding below, at which KRCC had the burden of proving supervisory status. Referring to this shift of the burden of proof as a mere "practical consideration," the Board explains

> Because the Board is not a litigating party to those proceedings, it is inappropriate to place an

> evidentiary burden in those proceedings on the Board. . . . Although the General Counsel is a party to an unfair labor practice proceeding, that circumstance does not warrant — let alone compel — a rule requiring General Counsel to bear the burden of proving . . . that disputed individuals . . . are not supervisors.

Petitioner's Brief at 41-42. Stated plainly, the Board contends that it has no burden in a representation case hearing, because it was not a party: the union and the employer were the parties. Procedure in a representation case compelled the employer to establish that its nurses were not supervisors. The Board, having ruled that they are employees, then uses that ruling as a substitute for the burden of proof it must carry in an unfair labor practice proceeding, as directed by Sections 8(a)(5) and 10(c) of the Act.

This case is a test of the Board's certification of a unit of putative supervisors. Under NLRB procedure, the Board in a representation proceeding determined that the nurses at issue were "employees." A representation proceeding is styled by the Board as "nonadversary," 29 C.F.R. § 101.20; *Ohio Masonic Home*, 295 N.L.R.B. 390, 393 n.7 (1989), a legal fiction if ever there was one.

When an employer asserts a unit proposed by a union is inappropriate because some or all of its members are supervisors, the Board places the burden of proof of supervisory status on the employer. *Ohio Masonic Home*, 295 NLRB at 393. Representation case hearings are presided over by a hearing officer, who is not an administrative law judge, and is often not a lawyer. John D. Feerick, Henry P. Baer, and Jonathan P. Arfa, *NLRB Representation Elections*

§ 7.3, at 234 (1989). The hearing officer does not permit the parties to explore issues such as witness pro-union bias on cross-examination.

Despite the fact that the parties typically present diametrically opposite evidence in these proceedings, the Board expressly does not render any credibility determination such as one would find in a determination by an administrative law judge. This is not surprising, since the finder of fact is the Regional Director, not the hearing officer who hears the evidence. *Id.* Instead, the Regional Director relies heavily on the report prepared by the hearing officers, and may review the hearing transcript. Despite his "distance" from the proceedings, the Regional Director does make *de facto* credibility determinations insofar as he resolves testimonial conflicts by finding the facts to be as one side or the other posits.

The decision of the Regional Director may be appealed to the NLRB. The NLRB's review is hampered by the absence of credibility determinations by the "finder of fact," the Regional Director. Decisions of the NLRB in representation cases are not immediately reviewable. *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-77 (1964). In order to gain judicial review, the employer must first lose a representation election. Following the election and Labor Board certification, the employer must refuse to bargain with the union, for the express purpose of inviting the union to file an unfair labor practice charge alleging an unlawful refusal to bargain, a violation of Section 8(a)(5). *Id.* The employer does not contest the charge, in effect admitting that it refused to bargain, but claims that it is doing so to appeal the Board's decision that the employees in question are not "supervisors" within the meaning of the Act.

The Board asserts this Court should not require it to prove the appropriateness of the unit in an unfair labor practice trial, because this would inconveniently cause a "relitigation" of supervisory status. Petitioner's Brief at 41-42. However, given the lack of procedural safeguards in representation cases, there is a question as to whether supervisory status is ever truly "litigated" in the first place. Concerns in this regard are exacerbated to the extent the Board renders representation case decisions to further an unstated policy goal of denying supervisory status to nurses.

The NLRB acknowledges that its General Counsel is a party in § 8(a)(5) cases, but contends that it essentially has no burden of proof. According to Petitioner, the General Counsel's "burden" is just to show (1) the "existence" of NLRB-issued certification, whether valid or not; (2) the union demanded to bargain with the employer; and (3) the employer refused. Petitioner Brief, p. 41. The Board conducts no hearing on the charge. No ALJ hearing is conducted as to the threshold determination that the employees at issue are not supervisors. The record of the representation case below is relied upon as adequately establishing the requisite facts. The Board summarily finds the employer violated the Act. At that point, the employer can seek judicial review. Thus, Board procedures are both a sword to bind employers to findings that its putative supervisors are employees, and a shield to avoid the burden of having to actually prove it.

As this analysis of Board procedure displays, neither the General Counsel nor anyone else associated with the NLRB has any substantive burden of proof to sustain the Board's order that the employer violated the Act. Instead, the NLRB attempts to circumvents Section 10(c) of the

NLRA and Section 7(c) of the APA with the glib assertion that unit issues are fully litigated during the representation stage. Under the Board's procedure, the only party with any substantive burden is the employer, the respondent charged with violating the NLRA. As the Sixth Circuit found, the Board's reliance on its procedures to abandon its obligation to prove *all* the elements of the unfair labor practice it found justifies the denial of enforcement to its order.

CONCLUSION

The AHCA urges this Court to affirm the decision of the Sixth Circuit finding the nurses are not supervisors within the meaning of Section 2(11) of the NLRA. Additionally, the AHCA urges this Court to affirm the Sixth Circuit's requirement that the NLRB prove that the nurses are non-supervisory employees as an element of the unfair labor practice found in its order. The judgment of the Sixth Circuit regarding the burden of proof should be affirmed for three principal reasons: (1) the Board has ignored its statutory obligation to prove each element of an alleged violation; (2) the Board ignores the express will of Congress to protect the employer's supervisory rights; and (3) representation case procedure is an inadequate substitute for the Board's statutory burden of proof.

Respectfully submitted,

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